UNITED STATES TAX COURT
WASHINGTON, DC 20217

YOUSSEF YOUSSEFZADEH,	)	
	)	
Petitioner(s),	)	
	)	
v.	)	Docket No. 14868-14 L.
	)	
COMMISSIONER OF INTERNAL REVENUE,	)	
	)	
Respondent	)	
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ORDER AND DECISION

This case was on the October 26, 2015 calendar for Los Angeles, and arises from Youssefzadeh's 2011 tax return. On Schedule B of that return he omitted some information and asserted his Fifth Amendment privilege against self-incrimination instead. The IRS assessed a frivolous-return penalty against Youssefzadeh and filed a notice of intent to levy. Youssefzadeh timely requested a collection due process (CDP) hearing, at which he contested only the penalty. The Appeals officer upheld the penalty, and Youssefzadeh petitioned this Court for review. The Commissioner moved for summary judgment and Youssefzadeh filed a response and cross-motion.

Background

We may grant summary judgment when there is no genuine dispute of any material fact and a party is entitled to judgment as a matter of law. Rule 121(b); *Sundstrand Corp. v. Commissioner*, 98 T.C. 518, 520 (1992). After the moving party submits a proper summary-judgment motion, the nonmoving party cannot rest on allegations or denials in his pleadings, but he must present specific facts

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showing that there is a genuine issue for trial. Rule 121(d); Dahlstrom v. Commissioner, 85 T.C. 812, 820 (1985). However, the moving party still has the burden of proving that there is no genuine dispute of material fact and we draw any factual inferences in favor of the nonmoving party. *Dahlstrom v. Commissioner*, 85 T.C. 812, 821 (1985).

This Court reviews a determination of a CDP hearing *de novo* when the underlying liability was properly before the Appeals Officer. *Goza v. Commissioner*, 114 T.C. 176, 181-82 (2000). Although the notice-of-deficiency procedures don't apply to frivolous-return penalties, we've held that the penalty is itself is the underlying liability. *Callahan v. Commissioner*, 130 T.C. 44, 49 (2008). Because Youssefzadeh never had an opportunity to dispute the penalty before his CDP hearing, we review the issue *de novo*. *Id.*

We heard oral argument on the motion on October 26, 2015. At that argument both parties agreed that the scope of review in this case could be limited to the administrative record that the Commissioner compiled. Youssefzadeh had a few items to add to the record, but it turns out that we don't need them to decide the case. That means that, even though we use a *de novo* standard of review, we don't need a trial to determine the relevant facts, about which the parties agree there is no genuine dispute.

The Facts

Youssefzadeh timely filed his 2011 tax return, and filled out most of the lines in a normal fashion. But on Schedule B (interest and dividends) he refused to answer some questions and fill in some values. He instead invoked his Fifth Amendment privilege against self-incrimination, and wrote that if his answers to these questions might lead to (or actually be) incriminating evidence against him. The IRS warned that it would assess a frivolous-return penalty against him unless he filed a return with all the required information. Youssefzadeh refused and the IRS made good on its threat. It then started collection procedures and issued Letter 1058 to Youssefzadeh to notify him of its intent to levy. Youssefzadeh timely filed a request for a CDP hearing.

Youssefzadeh's form said he was interested in collection alternatives, but he was actually only interested in contesting the entire penalty. His argument was straightforward -- he had a valid Fifth Amendment claim and wasn't trying to waste the IRS's time. The Appeals officer upheld the revenue agent's determination. Youssefzadeh then petitioned this Court for review.

In his motion for summary judgment, the Commissioner argues that Youssefzadeh's return was frivolous as a matter of law. Youssefzadeh disagrees.

Discussion

The Commissioner must find three things to assess a frivolous-return penalty. First, the document must purport to be a tax return. I.R.C. § 6702(a)(1). Second, the return must either omit enough information to prevent the IRS from judging "the substantial correctness of the self-assessment" or must clearly appear to be substantially incorrect. I.R.C. § 6702(a)(1)(A)-(B). Third, the taxpayer's position must be frivolous or demonstrate a desire to impede the IRS's administration of the Code. I.R.C. § 6702(a)(2)(A)-(B). We limit our review to the face of the return when deciding if the return was frivolous as a matter of law. *Callahan*, 130 T.C. at 51. The burden of proof is on the Commissioner when he asserts a penalty under I.R.C. § 6702. I.R.C. § 6703(a).

We can easily check factor one off the list. Youssefzadeh filed the standard Form 1040 and we have no problem saying he meant it to be his tax return (nor does the Commissioner contest this). The second factor isn't so easy, but after examining the face of the return, we ultimately hold that it contained sufficient information. The face of Youssefzadeh's return includes all of a normal return's numerical information -- he's not one of those tax protesters who fills out a return with zeroes on nearly every line. *See, e.g., Lindberg v. Commissioner*, 99 TCM 1273, 1277 (2010); *Hill v. Commissioner*, 108 TCM 12, 14 (2014). He did black out the source and amount of some interest on Schedule B, but importantly, he included the *total amount* of interest on line 4. There don't appear to be any other irregularities.

The Commissioner argues that he needs the missing information to determine if Youssefzadeh's return is accurate, but he fails to give any reasons why. And it's important that the standard isn't "Is the return completely correct?" but "Is the return substantially correct?" We hold that this return on these undisputed facts is -- considering that the face of the return appears to include the total amount of interest while only redacting the source of one payer.

The Commissioner stumbles into the third factor too. He argues that Youssefzadeh's return is frivolous because the IRS has identified claiming the Fifth Amendment as a reason for omitting information is a frivolous argument. Notice 2010-33, 2010-17 I.R.B. 609. Therefore, the Commissioner argues,

Youssefzadeh's return must've been frivolous. But Notice 2010-33 doesn't say omitting some information because of fear of self-incrimination is frivolous; it says that omitting "*all* financial information" is frivolous. *Id.* (emphasis added). This distinction is important and appears elsewhere. The Internal Revenue Manual says it's frivolous when an "individual makes an improper *blanket* assertion of the Fifth Amendment right against self-incrimination as a basis for not providing *any* financial information." I.R.M. 4.10.12.1.1(10) (emphasis added). The Manual goes on to say that "judicial precedents clearly establish that failure to comply with the filing and reporting requirements of the federal income tax laws will not be excused based upon *blanket* assertions of" the Fifth Amendment. I.R.M. 4.10.12.1.2(6) (emphasis added). A review of Youssefzadeh's return reveals that it contains plenty of financial information and isn't covered by any blanket assertions.

The Supreme Court held a long time ago that the Fifth Amendment doesn't excuse a complete failure to file a tax return. *United States v. Sullivan*, 274 U.S. 259, 263 (1927). But the Court went on to say in the same opinion that if the form "called for answers that the defendant was privileged from making he could have raised the objection in the return." *Id.* It later specifically held the privilege does apply to tax returns, provided the taxpayer affirmatively claims the privilege on the return and does so before he files it. *Garner v. United States*, 424 U.S. 648, 656 (1976). The Commissioner's assertion without further analysis that a claim of the Fifth Amendment privilege on a return must in all cases be frivolous is simply wrong.

The law doesn't let taxpayers invoke the privilege on a tax return with random and unjustified invocations. Instead, he "must be faced with substantial hazards of self incrimination * * * that are real and appreciable." *United States v. Neff*, 615 F.2d 1235, 1239 (9th Cir. 1980) (internal quotations omitted). He must have "reasonable cause" to fear that answering a question on a tax return could lead to criminal prosecution. *Id.* But the answer doesn't have to be so incriminating that it supports conviction itself. *Id.* All the answer has to do is "provide a lead or clue to evidence having a tendency to incriminate." *Id.*

At the same time, a taxpayer must show enough to allow us to conclude that there is at least a risk of self-incrimination (while at the same time not revealing enough information to realize the very risk the taxpayer is trying to avoid). *Hoffman v. United States*, 341 U.S. 479, 486 (1951). We first determine if we find "a real and appreciable danger of incrimination exists" by examining the "implications of the questions(s) in the setting in which (they are) asked." *Neff*,

615 F.2d at 1239-40. If we aren't convinced, then it's up to the taxpayer to show us why we're wrong. *Id.*

Youssefzadeh correctly tells us here that 31 U.S.C. § 5314 and 31 U.S.C. § 5322 make it a crime to willfully fail to file an FBAR.[1] The questions asked on Section B of the Form 1040 elicit information that can easily be used to determine if the taxpayer has filed an FBAR. And, as the Sixth Circuit pointed out, "this section of the return refers taxpayers to a booklet that further outlines their responsibilities for reporting foreign bank transactions. This booklet discusses the duty to file [the FBAR]." *United States v. Sturman*, 951 F.2d 1466, 1477 (6th Cir. 1991). Because the lines that Youssefzadeh redacted ask for information that triggers the duty to file an FBAR,[2] and because willful failure to file an FBAR is a crime, we hold that Youssefzadeh has shown us a real and appreciable danger of self-incrimination by being compelled to answer the questions on Section B. In other words, Youssefzadeh's return wasn't frivolous by reason of invoking the Fifth Amendment privilege. Because the Commissioner raised no other grounds for imposing the penalty, we hold that Youssefzadeh's return wasn't frivolous or made with an intent to impede the administration of the code.

We cannot sustain the penalty, which means that we cannot sustain the Commissioner's determination to collect it.

It is therefore

ORDERED that respondent's motion for summary judgment is denied. It is also

ORDERED that petitioner's cross-motion for summary judgment is granted. It is also

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[1] An FBAR is the Report of Foreign Bank and Financial Accounts (Form TD-F 90-22.1). Each U.S. person that has a financial interest in or signature authority over a foreign financial interest must annually file this form, subject to certain definitions and limitations. *See* 31 C.F.R. § 1010.350(a).

[2] Question 7a on Form 1040 asks the taxpayer if he or she is required to file an FBAR. If the taxpayer is forced to answer this as "yes" but has failed to file an FBAR, the answer at least reasonably raises the threat of criminal prosecution.

ORDERED and DECIDED that respondent may not proceed with the collection of petitioner's federal income tax liability for the tax year 2011 as described in the Notice of Determination Concerning Collection Action(s)under Section 6320 and/or 6330, dated May 28, 2014.

(Signed) Mark V. Holmes
Judge

Entered: **NOV 06 2015**